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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

DONG AH LON, *Appellant*,

vs.

MARIE A. PROCTOR, Commissioner of Immigration and Naturalization at the Port of Seattle, Washington, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

The appellant respectfully contends that the District Court of the United States for the Western District of Washington, Northern Division, had jurisdiction of this cause below, and that the United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction of this cause upon appeal to review the order in question under:

Section 41, subsection 22 of the United States Judicial Code, United States Code Anno-

[*Italics wherever used in this brief are ours*]

tated, Title 28, Section 41, subdivision 22, 643,

which reads as follows:

> "Suits under immigration and contract labor laws. Twenty-second. Of all suits and proceedings arising under any law regulating the immigration of aliens, or under the contract labor laws. (Mar. 3, 1911, c. 231, P. 24, par. 22, 36 Stat. 1093)."

Appellant respectfully contends that the petition for writ of habeas corpus, as set forth in pages 1 to 4, inclusive, of the transcript of record, shows the existence of the jurisdictions above referred to.

STATEMENT OF THE CASE

This is an appeal from an order of the District Court denying a writ of habeas corpus. The facts are as follows:

The appellant, Dong Ah Lon, is a Chinese woman now 22 years of age, who arrived in Seattle on August 9, 1938, and applied for admission to the United States, as the foreign born daughter of Dong Toy, a native born citizen of the United States. The only question presented is whether or not the appellant is the blood daughter of Dong Toy.

The appellant and two of her prior landed brothers, Dong Ball, who was admitted in 1920, and Dong Hong, who was admitted in 1935, were examined by the Board of Special Inquiry at Seattle on September 7, 8 and 9. The appellant had in the meantime from August 9, 1938, been held in custody be-

hind locked doors and barred windows at the Immigration Station at Seattle, and is still so held. The Board of Special Inquiry ordered appellant excluded, which order was affirmed by the Board of Review, at Washington, D. C., on appellant's appeal. Thereafter a petition for a writ of habeas corpus was filed by the appellant, which petition was voluntarily dismissed by appellant and the matter was reopened on appellant's petition in which she asked to be permitted to present further evidence and to again testify. A third prior landed brother of the appellant, Dong Yum, who was admitted in 1921, and another witness, Lee Ling Jung, were then examined by the Board of Special Inquiry at Seattle, on January 6, 1939, but the appellant was not allowed to again testify. The appellant was again ordered excluded, from which order she appealed to the Board of Review at Washington, D. C. Her appeal was there dismissed and thereafter her petition for writ of habeas corpus was denied by the District Court at Seattle, and this appeal therefrom follows.

The citizenship of Dong Toy, the alleged father of the appellant, now deceased, is conceded. It is also conceded that the father was in China at a time to have made the claimed relationship possible.

Dong Toy, the alleged father of the appellant, claimed in May, 1919, to have a daughter of approximately the name and birth date alleged by and for this appellant. The alleged father went to China in 1923 and died there the following year.

The appellant and her witnesses were in substan-

tial agreement on all questions of family history, there being minor disagreements therein concerning which the Board of Review stated:

> "The lack of agreement regarding these matters might be attributed to inaccuracy of memory on the part of the applicant whose mentality is indicated not to be either sharp or clear." (Decision Board of Review, October 20, 1938, p. 2)

The Board of Review bases its order of exclusion on the alleged disagreement between the testimony of appellant and her three brothers concerning the location of certain buildings and the identity and locations of the homes of residents of the village of Ping On, the home village of the appellant and her father and brothers.

ASSIGNMENTS OF ERROR

The court erred as follows:

(1) That the court erred in not granting the writ of habeas corpus and discharging the appellant, Dong Ah Lon, from the custody and control of Marie A. Proctor, Commissioner of Immigration and Naturalization at the Port of Seattle, State of Washington.

(2) That the court erred in not holding that the evidence adduced before the Immigration authorities was insufficient, in law, to justify the conclusion of the Immigration authorities that the appellant was not a citizen of the United States

(3) That the court erred in not holding that the appellant was a citizen of the United States and a

Chinese person lawfully entitled to remain in the United States.

(4) That the court erred in not holding that the Immigration authorities acted unfairly and unreasonably in giving probative value to matters and things occurring outside of the regular hearing and not presented at any regular hearing as legal or competent evidence, or according petitioner, or her counsel, any opportunity of cross-examination or direct examination of appellant by counsel of appellant and in not allowing appellant to be represented by counsel when witnesses were examined, and in not allowing appellant to have counsel or a friend present at the time of her hearing.

(5) That the court erred in not holding that the appellant had met the burden of proof to establish her American citizenship.

ARGUMENT

As the assignments of error involve substantially the same question, they will be argued together.

We wish to point out first the following facts:

1. The citizenship of Dong Toy (now deceased) the alleged father of the appellant is conceded.

2. The father, Dong Toy, "claimed in May, 1919, to have a daughter of approximately the name and birth date alleged by and for this applicant." (Decision of Board of Review, page 1, October 20, 1938)

3. On every occasion since May, 1919, that any

member of this family has testified, this appellant has been named as a daughter of Dong Toy and sister of the three witnesses who testified they were her brothers. These occasions have been numerous. (Dong Toy, San Francisco file 12017/20194; Dong Yum, San Francisco file 35428/13/23, May 18, 1921; Dong Hong, San Francisco file 29879/3-11; Dong Ball, San Francisco file 35428/14-5, and the other files included in the record.)

4. That the appellant is a woman, and seldom is a woman claimed by Chinese for immigration purposes.

Thus the existence of a daughter of Dong Toy, named Dong Ah Lon, has been established since 1919, a period of 20 years.

This prior claim over a long period of time is very important and has been so recognized by our courts in many cases, among which are *Ng Yuk Ming v. Tillinghast* (C.C.A. 1) 28 F. (2d) 547, in which the court said:

> "It thus appears that in 1914 when the appellant was two years old, and thirteen years before he applied for admission to this country, the alleged father at Seattle testified before the immigration authorities that he had a son bearing the name of the applicant, who was born September 25, 1912, which he confirmed on every other occasion upon which he was called upon to testify. *It is clear that in 1914 the alleged father had no reason for stating that he had such a son if it was not the fact.* The question of relationship therefore, on the undisputed evi-

dence, narrows itself down to the question whether the applicant is the Ng Yuk Ming that was born of the union of Ng Ling Fong and Moy Shee on September 25, 1912. All three witnesses who gave testimony in this case are in agreement upon this point. The discrepancies relied upon by the immigration authorities relate to collateral matters, all of which are of such a trifling nature as to furnish no substantial evidence for reaching a contrary conclusion."

and *U. S. ex rel. Lee Kim Toy v. Day*, 45 F. (2d) 206, at page 207, in which the court said:

"The applicant claims to be Lee Shew Hong. *It would be pushing beyond the bounds of reason to suppose that Lee Kim Toy in 1915 concocted a story of a fictitious son for use fifteen or more years later* * * *.

"The convincing character of such antecedent evidence has been pointed out by the courts in cases of this type. *Johnson v. Ng Ling Fong* (C.C.A.) 17 F. (2d) 11, 12; *U. S. ex rel. Leong Ding v. Brough* (C.C.A.) 22 F. (2d) 926, 927. The Boards of Special Inquiry, in my opinion, did not give this proof the weight which it deserves. * * *"

The Immigration authorities have many times said that Chinese always have large families and they are always all sons, no daughters. This appellant is a woman, and the statement of the court in *Mason ex rel. Lee Wing You v. Tellinghast*, 27 F. (2d) 580, as follows:

"* * * And it is also of much significance that in 1914 and 1922 the father stated that he had such a son. *It is hardly conceivable that the*

father had at these times laid his plans to bring in an outsider as his son and made a false announcement of paternity as a first step in his intended fraud."

is all the more applicable since the claimed child is a daughter.

All witnesses (except Lee Lin Jung, who testified he did not know appellant) readily identified her and her photograph, and she in turn readily identified them (Pages 7, 8, 12, 13, 16 and 24, Seattle file No. 7030/11310).

Except in the arbitrary procedure developed in Chinese cases, the most forceful testimony concerning relationship is the direct testimony of the members of the family group. Here, coupled with the identification above mentioned, the direct testimony of the witnesses themselves, and the establishment of the existence of a daughter of Dong Toy of same name and age as appellant, we have the very distinct resemblance of Dong Ah Lon and her brother Dong Hong and her father Dong Toy. (See photographs of these persons.) This constitutes the strongest possible evidence of relationship.

Even the Board of Special Inquiry in the first paragraph on page 19 of Seattle file 7030/11310 states as follows:

"Dong Toy departed from San Francisco January 6, 1916, for China, and returned on May 17, 1919, at which time he claimed marriage to Hom Shee, second wife, CR 5-2-15 (March 18, 1916) and described a daughter, Lan Hai, born CR 5-12-26. *This child is presumed to be the present*

applicant, although there is a difference in the name and date of birth. The Board concedes the essential trip."

The difference in names referred to is easily explained when one takes into consideration that Chinese names when written in the English language follow the phonetic spelling and that spelling depends on the particular interpreter at the time. The difference of 10 days in the birth date, one being the 16th, the other the 26th, must be attributed either to a typographical error or one in interpreting.

The appellant and her three witnesses testify in substantial accord and there is no discrepancy about the names and ages of the appellant's father, mother, granduncle, two sisters-in-law, seven nephews, one niece, and her five brothers.

She agrees with her witnesses on such very unusual items, which do not appear unless witnesses are testifying from actual knowledge of the facts and from their own experience, as that her father died at night, that he was first buried in a hill two (2) lis west of the home village, that he was later reburied in a hill a little farther west. The witnesses agree that a bust photograph of their father in American clothes hangs on the living room wall. They agree on the number of visits by the two older brothers to China, and very singularly all of the appellant's brothers testify that her hair was long when they last saw her in China, although appellant's hair is now bobbed, and she states she had it bobbed just before she left home on her journey for the United

States. She outlines in full the quarters occupied by various members of the household or home in China.

She agrees with her brothers perfectly as to the description and location of the house in which she is living and agrees concerning the landmarks surrounding the village.

All of the discrepancies mentioned by the Immigration officials and upon which they rely for rejecting the appellant deal with matters that are not connected with the family and have no bearing on the question of relationship. The location of the houses of the various persons living in the village and the disagreements as to who lived in which house and the location of the village school which the appellant did not attend have no bearing on the question of relationship. See *Johnson v. Damon* (C.C.A.) 16 F. (2d) 65; *Gung You v. Nagle* (C.C.A.) 34 F. (2d) 848; *One Din v. Ward,* 20 F. Supp. 424; *Ng Yuk Ming v. Tillinghast* (C.C.A.) 28 F. (2d) 548; *Hom Chung v. Nagle* (C.C.A.) 41 F. (2d) 126.

In testifying that the school was west of the village the appellant probably had reference to the school she attended which was in fact west of the village and not to the school attended by her brothers to the east.

Such instances as this make clear the arbitrary action of the Board of Special Inquiry in refusing to allow the appellant to again testify when the case was reopened. It would then have been a simple matter to have definitely ascertained to which school she referred. Many of the instances seized upon by

the Board are of a similar nature. The Board seems to prefer to have such discrepancies unexplained.

In considering this record it must be borne in mind that the appellant has not had many advantages. She has attended school for only two years. There was no special place for girls to live as was the custom in many Chinese villages, and she lived at home. She was confined largely to the house and to the household duties. In addition thereto the record is replete with indications that the appellant is not bright and that she has misunderstood many of the questions. Even the Board of Review itself states as follows (Decision Board of Review, October 20, 1938, pp. 1 and 2):

> "The first group of features noted as adverse to the appellant's claim are spoken of by the Chairman of the Board of Special Inquiry in his summary as instances of 'lack of knowledge of family history.' The applicant and her witness alleged brothers alleged brothers agree that the deceased alleged father was married twice, first to a woman named Jee Shee and after her death to a woman named Hom Shee. According to the testimony of the alleged brothers, the three oldest sons in the family were given birth by Jee Shee. The applicant testifies that so far as she knows Jee Shee never bore any children and that her mother Hom Shee told her that she was Hom Shee's fourth child. She later on recall said that she did not know who was the mother of her three older brothers. In view of the fact that the applicant gives her mother Hom Shee's age as 47 and her oldest brother's age as 39, which would mean that if Hom Shee were the

mother of this oldest brother, she would have given birth to him when she was eight years old, or seven years old in American reckoning, would seem to make this feature *chiefly an indication of the applicant's ignorance or stupidity.* In any event, she could have knowledge of the facts only through hearsay. The applicant's witness alleged brothers testify in accordance with previously given testimony that the alleged father's mother's name was Hom Shee. The applicant testifies that according to her understanding her paternal grandmother's name was Chin Shee. It would seem that one should know the family name of one's paternal grandmother but here again the fact that the paternal grandmother is said to have died many years ago might make this a lack of knowledge which the applicant could have only through hearsay since while the witness alleged brothers say that the paternal grandmother's name appears upon ancestral papers kept in their home, there is no showing that the applicant despite her two year school attendance is able to read. Two other disagreements between the applicant and her witness alleged brother Dong Hong involving matters of family association are noted, one as to the length of time Dong Loon, an older alleged brother of the applicant, who was excluded and deported in September, 1925, stayed in the home village before going to the Philippines and the other as to whether the alleged brother Dong Hong was last in China between 1931 and 1934, or as the record shows between April, 1929, and December, 1930. *The lack of agreement regarding these matters might be attributed to inaccuracy of memory on the part of the applicant*

whose mentality is indicated not to be either sharp or clear."

In addition to the instances italicized in the Board of Review's decision, above, there are many other instances of her lack of understanding.

"Q Who told you you were born CR 5-12-16?

A My *stepmother.*

Q Can you explain why your father testified at San Francisco May 17, 1919, that he had a daughter, Lan Hai, born CR 4-12-26?

A I don't know. I learned my birthdate from my *stepmother.*

Q What is the name of your father's second wife?

A Hom Shee, 47 years old. * * *

Q How many children were born to Hom Shee by your father?

A Five sons, one daughter.

Q *Are you the daughter?*

A Yes."

On page 3 the appellant testified:

"Q You state that you are the fourth child born to *Hom Shee.* How do you determine this?

A My *mother* told me."

In other words the applicant is recorded as referring to her own mother as her step-mother.

Another example of the applicant's mental slowness is to be found on page 3, where she testified:

"Q Is Yow Fee older than Yow Hah?

A Yes.

Q How do you know that?

A I should know. I live in the same house.

Q If somebody said Yow Hah was older than Yow Fee, would he be mistaken?

A That's right, Yow Fee is younger.

Q You just told us that Yow Fee was older than Yow Hah?

A I just made a mistake."

On the same page, the appellant testifies that her brother, Dong Hong, has *three* sons, and then proceeds to describe *four* as follows:

"A Dong Hong, marriage name, Oh Tun, 37 years old, living in Seattle, wife is Chin Shee, natural feet, has *three* sons and one daughter, You Foon, 19 years old, not married, attending school in our village, You Goon, 16, also attending school in the village, You Hin, twin to You Goon, in the same school. *There is another boy*, You Gok, 9 years old, also attending school. Girl, Dong Ah Haw, 8 years old, not attending school. They occupy the small door side bedroom of our house."

Another example, on page 4, the appellant testifies:

"Q Did you ever see Dong Loon?

A Yes, I saw him. He came to the United States more than ten years ago.

Q Have you seen him since that time?

A *No.* * * *

Q Did Dong Loon return to your home before leaving for Manila?

A Yes.

Q How long did he remain at home before going to Manila?

A For about three years before he went to Manila."

An example of misunderstanding or faulty interpretation is found on page 5 and page 17:

"Q What lies directly in front of your village?

A Fishpond in front and beyond that the Seo Hoy *Village.* * * *

Q What is the name of the *stream* near your village?

A Seo Hoy, about half a li in front of our village.

Q Is there a village called Seo Hoy?

A No."

SUMMARY AND CONCLUSION

Now, in considering the above remember we have here a girl who has had only two years of schooling in all of her life, a girl who has always lived in a small village in a country where girls are unimportant and treated virtually as slaves in this class of family, who comes here at a time when that home and that village are disrupted by war, when everything is in a state of confusion. She appears before strangers in a strange country where everything is foreign and confusing. She must speak through a strange interpreter. Her natural fright and nervousness is heightened by the fact that she is held a prisoner, locked behind bars for a month unable to see anyone that she knows, or to whom she can talk as a friend. Taking into consideration all of these factors it is natural that there is confusion in her mind and that these discrepancies, which in no way bear upon her relationship to Dong Toy, her father, and to her brothers, have appeared.

It is strange to us that although the duty of the immigration authorities is as much to establish citizenship as to exclude the applicant, that the Board of Special Inquiry and the Board of Review absolutely ignore the matters that are favorable to the appellant and point out only the unfavorable ones. It is true that the immigration authorities are the triers of the facts but they cannot arbitrarily and capriciously ignore facts favorable to the appellant and emphasize the unfavorable facts as they have done here.

To show as one example the unreasonableness of the Immigration authorities, they cite as a discrepancy the fact that the applicant's brother Dong Hong went to China April 26, 1929, and returned December 10, 1930, and that the appellant testifies that he went home in 1931 and returned in 1933, although the record shows that Dong Hong was in China for almost two years and the appellant testifies that he was at home when his nine year old son was born and was not at home when his eight year old daughter was born. Obviously had the Immigration authorities stopped to think they could have seen that the appellant was mistaken as to the date but that she knew full well when Dong Hong was at home. All one needs to do is to subtract nine years from the date when the applicant testified and it will show that Dong Hong was there in 1929 and when his son was born and subtract eight years from the date when the applicant testified to show that Dong Hong had left in 1930, when his daughter was born. Thus the Immigration authorities pick out only those portions

of the testimony that are unfavorable to the appellant and do not consider the portions of the record that are favorable to her. Nor do they try to set her straight although it is obvious that the appellant is unthinkingly mistaken.

It is apparent from studying this record that the Immigration authorities were not carrying out the duty imposed upon them which duty is outlined in the case of *Low Hu Yuen v. U. S.* (C.C.A.) 9 F. (2d) 327, at page 331:

> "The purpose of the hearing is to inquire into the citizenship of the applicant, not to develop discrepancies which may support an order of exclusion, regardless of the question of citizenship."

In *Kwock Jan Fat v. White*, 253 U. S. 454, at p. 464 (64 L. ed. 1010) Mr. Justice Clark stated in an opinion of the Supreme Court:

> "The acts of Congress give great power to the Secretary of Labor over Chinese Immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the *tradition and principles of free government* applicable where the *fundamental rights of men are involved*, regardless of their origin or race. It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited to prevent abuse of this extraordinary power. * * * *It is better that many Chinese Immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from this country.*"

By the testimony of every member of this family from 1917 to the present date it has been unequivocally established that Dong Toy had a daughter of the age of this appellant. It is a well known fact that female children are unimportant in China. They are not even mentioned in many Chinese records. Because of this the Immigration authorities have times innumerable pointed out as an argument for exclusion that Chinese seeeking to have children admitted to this country have many sons, never any daughters. This seems to be recognized as a legitimate argument on the part of such officials. Here, however, we have a father, Dong Toy, for twenty years claiming before the Immigration Officials that he has a daughter. This claim has been reiterated ever since, not only by himself but by his male children. Using the arguments so frequently advanced by the Board it is certain that Dong Toy in 1917 did not fraudulently claim to have a daughter for immigration purposes. Had the declaration been fraudulent it would have involved a son, not a daughter. If, therefore, it is fair for the Board to continuously urge as a reason for exclusion that the Chinese fraudulently claim only sons, is it not a legitimate argument in favor of the claimed relationship that this father for 20 years has claimed the existence of a daughter?

No prior attempt has been made to admit this daughter to this country. Dong Toy is now dead and it having been forever established that he had but one daughter it follows that but one person can be admitted to this country as such daughter. All of these

facts in the light of the record lead to the conclusion that this appellant is the individual claimed by Dong Toy as a daughter for 20 years and that the claimed relationship has been established.

It should also be taken into consideration that the appellant is being brought to this country to marry Lee Lin Jung, who is, to use the words of the Board of Review (in their decision of March 21, 1939) "shown to be a man of good reputation and his testimony to have the applicant become his wife in order to care for his seven motherless children removes any possibility of an immoral intent in the attempt to have the applicant into the United States." Thus the brothers who have testified cannot be accused of testifying falsely for some personal gain. They have no interest in the matter other than to have their sister admitted as a citizen, as she should be.

There is nothing more important to any of us today than our citizenship in the United States, yet it is almost beyond our power to conceive how important that citizenship is to a person like the appellant. She is a girl from a country where even under normal conditions girls have few privileges or rights, a country that today is not under normal conditions but is torn by war, a country overrun by an army of an enemy having little regard for property or even life of the inhabitants of the invaded country. This girl might as well be condemned to death as to be sent back to China. As a matter of fact we may well say that she will go back to a life more horrible than death. Certainly under these circumstances where but one daughter has ever been claimed we submit

that as heretofore quoted: "It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from this country" (*Kwock Jan Fat v. White*, 253 U. S. 454-464, 64 L. ed. 1010).

We respectfully submit that the appellant has carried the burden imposed upon her and that she should be admitted to this country as a citizen thereof.

Respectfully submitted,

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